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In The

Supreme Court of the United States

October Term, 1995

CINDY L. HOTCAVEG and KEN POTRUE,

Petitioners,

v.

ROGER KENNEDY, Director, National Park Service,
BRUCE BABBITT, Secretary of the Interior,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Honorable Court should grant Petitioner's *Writ* of *Certiorari* for the compelling reason that the regulation challenged, 36 C.F.R. § 51.5 (1992), is not the National Park Service's (NPS) first regulatory interpretation of 16 U.S.C. § 20d, which provides a right of preference to a satisfactory concessioner, but instead is the reversal of the NPS's twenty-seven year old interpretation. Indeed, the NPS's new regulatory interpretation of a satisfactory concessioner's statutory right of preference comes 27 years after Congress enacted 16 U.S.C. § 20d, and 13 years after the NPS first promulgated its interpretation of 16 U.S.C. § 20d in 1972. Under this Honorable Court's precedent, in reviewing the NPS's change to its longstanding statutory interpretation of 16 U.S.C. § 20d, the courts below should have applied a presumption of correctness to the prior regulatory interpretation. In addition, the courts below should have afforded considerably less deference to the NPS's new interpretation of federal statute. Erroneously, however, the courts below applied the wrong standard of review in upholding the NPS's new statutory interpretation of 16 U.S.C. § 20d and thereby denied to Petitioners their statutorily granted right of preference. Therefore, this Honorable Court should grant this Petition to review and reverse the decision of the Eighth Circuit.

I. THE NPS'S NEW REGULATORY INTERPRETATION OF 16 U.S.C. § 20d IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE.

A. The Plain Language Of 16 U.S.C. § 20d Unconditionally Grants The Right Of Preference To A Satisfactory Concessioner Thereby Granting To The Concessioner, And Not The NPS, The Ability To Determine Whether The Right Will Be Exercised.

The NPS's argues that its new regulatory interpretation of 16 U.S.C. § 20d, which requires a satisfactory concessioner to submit a response that fully meets the terms and conditions of a prospectus before being entitled to the statutory right of preference, is consistent with the plain language of the statute. Indeed, the NPS states that its revised regulation "plainly give[s] such preference to existing concessioners." Respondents' Brief In Opposition at 5 (Respondents' Opposition). However, the NPS fails to note that the plain language of 16 U.S.C. § 20d automatically grants to a satisfactory concessioner a right of preference that may not be denied by the NPS.

16 U.S.C. § 20d provides that the Secretary:

> *shall . . . giv[e] preference* in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

Pet. App. at 9 (emphasis added). The NPS does not deny that Petitioners were "satisfactory concessioners," and thereby entitled, by Act of Congress, to the statutory right of preference. Under the NPS's prior, longstanding interpretation, a satisfactory concessioner need only submit a response to the

fact sheet to retain the right of preference. If another offer were determined to be the best proposal, the existing satisfactory concessioner could exercise its right of preference to meet or beat the better offer. 36 C.F.R. § 51.5 (1979), Pet. App. at 9-10. In this case, the Petitioners, having been granted the statutory right of preference by Congress, should have been allowed, by the NPS, to exercise their right by having the opportunity to meet or beat the better offer.

However, the NPS's new interpretation gives the NPS the power to eliminate the statutory right of preference, before a "satisfactory concessioner" ever has the opportunity to exercise that right, if such satisfactory concessioner does not submit what the NPS considers to be, in its sole discretion, a "responsive" offer. 36 C.F.R. § 51.5 (1992), Pet. App. at 15-16. This reverses the NPS's prior, longstanding interpretation in which the NPS recognized its obligation to honor the statutory right of preference, unless the existing satisfactory concessioner chose not to match or beat the better proposal. The important difference between the NPS's prior, longstanding interpretation, and its new interpretation, is that under the new interpretation it is the NPS, and not the concessioner, who determines whether or not the statutory right will be exercised. Therefore, against the plain language of 16 U.S.C. § 20d, which unconditionally grants a right of preference to an existing satisfactory concessioner, the NPS's new-found ability to eliminate what Congress has granted must fail.

B. The Right Of Preference Does Not Interfere With The NPS's Other Obligations Under The Concessions Policy Act.

The NPS argues that its new interpretation should be upheld despite the plain language of 16 U.S.C. § 20d

because it ensures the Secretary's ability to "promote the development of facilities that best serve visitors to the parks" under 16 U.S.C. § 20a. Respondents' Opposition at 6. After all, the NPS argues, "[n]othing in the language of the CPA suggests, let alone demands, that the right of preference must be an absolute right of renewal, regardless of whether the existing concessioner's offer meets the terms of the prospectus." *Id.* The NPS not only deliberately misconstrues Petitioners' contention, but its argument simply fails.

It has never been Petitioners' contention that the statutory right of preference is a guaranteed right of renewal in concession contracts. Petitioners assert that the right of preference granted to satisfactory concessioners, by Congress under 16 U.S.C. § 20d, allows the satisfactory concessioner, and not the NPS, to determine whether that right will be exercised. Indeed, as demonstrated by the facts of this case, the statutory right of preference is an intricate part of the fabric of the CPA that cannot be eliminated without destroying the tapestry.

Moreover, the statutory right of preference, as written by Congress and previously interpreted by the NPS, does not interfere with the NPS's other obligations. When the Big Spring Lodge contract came up for renewal, the Petitioners, who had operated the concession for sixteen years, were admittedly the satisfactory concessioners, entitled to the statutory right of preference. When the NPS issued a prospectus that exceeded the requirements of the previous concession contracts, its obligation to promote the development of facilities for the benefit of the public was fulfilled. Without knowing who, if anyone, would bid on the prospectus, Petitioners timely

responded by offering to operate the concession on substantially the same terms as they had for the previous sixteen years. Subsequently, the NPS received another response to its prospectus that offered to fulfill all of the requirements of the prospectus. Thus, the NPS had the opportunity to fulfill its obligation to consider and evaluate all proposals received.

The NPS's next step was to choose the contract it believed best fulfilled the requirements of the CPA. In this case, the NPS favored the offer submitted by the other bidder. At this point, the Petitioners, with their right of preference under the NPS's previous interpretation of 16 U.S.C. § 20d, should have had the opportunity to exercise that right. That is, Petitioners should have been given the opportunity to meet or exceed the offer submitted by the other bidder. Instead, under the NPS's new interpretation, because the NPS determined that Petitioners' offer was "nonresponsive," the NPS denied their statutory right of preference.

Ironically, the facts of this case presented the NPS with a no-lose situation had it simply followed the mandate of the CPA. First, if Petitioners had chosen not to exercise their right of preference, the NPS could have chosen the other bidder and received all the improvements it sought. Second, if Petitioners had chosen to exercise their right of preference and matched the better competing offer, the NPS not only would have received the improvements it sought, but also would have fulfilled Congress' desire for continuity of operations and operators. Thus, because the NPS used 36 C.F.R. § 51.5 (1992) to unlawfully eliminate Petitioners' statutory right of preference, the concession award was contrary to 16 U.S.C. § 20d and must be set aside.

II. THE NPS'S NEW INTERPRETATION OF 16 U.S.C. § 20d EVISCERATES CONGRESSIONAL INTENT AND IS NOT SUPPORTED BY A REASONED EXPLANATION.

The NPS argues that its revised interpretation of 36 C.F.R. § 51.5 (1992) is entitled to judicial deference under the *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) standard because it is not a change to the NPS's twenty-seven year interpretation of 16 U.S.C. § 20d, "but merely a clarification . . . " of its prior regulation as to how the right of preference will be implemented. Respondents' Opposition at 7. In the alternative, the NPS argues that even if its new regulation is a change of position, it is still entitled to judicial deference because it is a reasonable interpretation of 16 U.S.C. § 20d. *Id.* at 8.

This Honorable Court has instructed that in reviewing an agency's change to a longstanding statutory interpretation a presumption of correctness attaches to the prior interpretation. *See, Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 41-42 (1983) (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)). Moreover, this Court has held that considerably less deference is owed to an agency's interpretation of a relevant statute which conflicts with an agency's earlier interpretation. *Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 124 L.Ed.2d 368, 382-83 (1993). Thus, the NPS's arguments simply highlight the compelling need to grant Petitioners' petition in order to clarify that a reviewing court must apply a heightened standard of review and considerably less deference to an agency's change to a longstanding regulation, thereby protecting affected parties from arbitrary and capricious agency action.

A. No Deference Is Owed When An Agency Changes A Prior, Longstanding Statutory Interpretation.

The NPS is simply wrong when it argues that it did not change its interpretation of 16 U.S.C. § 20d, but merely clarified its prior regulation. As discussed in Part I. above, the NPS's new interpretation does not "clarify" its prior regulation, but eviscerates a satisfactory concessioner's statutory right of preference by eliminating the concessioner's ability to determine whether to exercise its statutory right. Under this Honorable Court's precedent, a reviewing court owes considerably less deference to an agency's change to a longstanding policy. The courts below erroneously accorded deference to the NPS's new statutory interpretation. Pet. App. at 7. Therefore this Honorable Court should grant this Petition to reverse the decisions of the lower courts.

B. The NPS's Explanation For Its Regulatory Revision Is Arbitrary And Capricious Because Congress Never Intended That Concession Contracts Be Competitive.

In arguing that its new interpretation of 16 U.S.C. § 20d is reasonable and therefore entitled to deference, even if it is a change in NPS policy, the NPS reveals that its desire is not to implement the will of Congress, but to achieve certain goals and objectives that Congress specifically declined to set forth in the CPA. First the NPS states that "in light of different circumstances" an agency is "free to alter . . . interpretative and policy views . . . so long as the agency's new approach is consistent with

express congressional intent. . . . " Respondents' Opposition at 8. However, the change in circumstance that the NPS sets forth, that is, to "enhance competition in the award and renewal of concession contracts," patently defies the plain language of 16 U.S.C. § 20d and congressional intent. *Id.* at 9. Where regulations are inconsistent with the statute under which they are promulgated they are "a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977).

The CPA is a uniquely designed statute and its history incorporates and reflects this design. Congress passed the CPA primarily to "put into statutory form policies which . . . have heretofore been followed by the [NPS] in administering concessions . . . . " S.R. No. 765, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 3489 (hereinafter "Senate Report") Pet. App. at 34. One of these longstanding policies, codified by Congress, "directs the Secretary to give preference to satisfactorily established operators in a national park system area when the time comes for the renewal or extension of contracts, or for the negotiation of new contracts." Senate Report, Pet. App. at 37. The reason that Congress granted a right of preference to satisfactory concessioners was to encourage continuity of operations and operators. *See* 16 U.S.C. § 20d.

Congress never intended that the award of concession contracts would be competitive. In fact, Congress specifically rejected a competitive bidding process in order to achieve continuity of operations and operators:

> The bill requires the Secretary to give public notice of his intentions to extend or renew and to consider and evaluate all proposals received as a result thereof. *This is not, and is not intended*

> *to be, a bidding procedure,* with the award automatically going to the high bidder, but it is intended to bring to the attention of the public, the Secretary, and all interested parties the situation and to assure all concerned that in negotiating the new contract all relevant factors are taken into account. *One of these factors, of course, and a very important one, is the desirability of continuity of operations and operators.*

Senate Report, Pet. App. at 36 (emphasis added). Thus, Congress provided a statutory right of renewal in concession contracts for satisfactory concessioners to ensure continuity of operations and operators.

The NPS did not abandon its original regulation because it was an improper interpretation of the statute, or because of a desire to "clarify" that regulation, but rather to achieve the NPS's new policy goal of increasing concession contract competition. This goal was adopted by then-Secretary Lujan who stated, in response to the recommendation that in order to increase competition the statutory right of preference needed to be legislatively eliminated: "I do not feel it is necessary to change existing legislation in order to change the definition of the statutory right of preference in renewal." Pet. App. at 40.

The NPS's new interpretation of 16 U.S.C. § 20d, as well as the arguments of the NPS in its brief, clearly demonstrate that the NPS seeks through regulation alone, to change an act of Congress. In light of the plain language of 16 U.S.C. § 20d, its legislative history and the NPS's own prior, longstanding regulatory interpretation, the NPS cannot reasonably explain how eradicating the opportunity for existing satisfactory concessioners to meet the terms of the best offer submitted supports the

congressional goal of continuity of concession operations, facilities and services. Because the NPS seeks to change, rather than to implement, the will of Congress, the courts below erroneously upheld the NPS's change to its interpretation of 16 U.S.C. § 20d. Therefore this Honorable Court should grant this Petition to review the decision of the Eighth Circuit which is in direct and irreconcilable conflict with the standard of review to be applied to a reversal of longstanding agency regulation as set forth in *Motor Vehicle* and *Good Samaritan*.

CONCLUSION

Respondents have failed to provide any cogent reason for this Court to reject Petitioners' Petition for *Writ* of *Certiorari* to review and reverse the decision of the Eighth Circuit Court of Appeals. Therefore, Petitioners' Petition for *Writ* of *Certiorari* should be granted.

Respectfully submitted,

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